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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAVID TAMMAN, Plaintiff and Respondent, v. NIXON PEABODY LLP et al., Defendants and Appellants.	B267439 (Los Angeles County Super. Ct. No. BC471675)

APPEAL from an order of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Reversed.

Hill, Farrer & Burrill, Kevin H. Brogan, Dean E. Dennis, and William A. Meyers, for Defendants and Appellants.

Law Offices of James P. Wohl, James P. Wohl; Law Offices of Stanton Lee Phillips, and Stanton L. Phillips for Plaintiff and Respondent.

This is the second time that these parties and this case have come to the Court of Appeal. In the first appeal, defendant and appellant Nixon Peabody LLP (Nixon Peabody) sought to overturn the trial court's denial of its anti-SLAPP motion brought pursuant to Code of Civil Procedure section 425.16[1] in response to a complaint filed by plaintiff and respondent David Tamman (Tamman). The Court of Appeal affirmed the trial court's order and awarded Tamman his costs on appeal. (*Tamman v. Nixon Peabody LLP* (Sept. 30, 2014, B252332) [nonpub. opn.].) Upon remand, the trial court awarded Tamman his attorney fees on appeal. Nixon Peabody and its attorneys, Hill, Farrer & Burrill (Hill Farrer), appeal the trial court's order.

We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Tamman filed an action against Nixon Peabody on October 25, 2011. On February 7, 2012, Nixon Peabody filed an anti-SLAPP motion pursuant to section 425.16. The trial court denied that motion.

On October 22, 2013, Tamman filed a motion for attorney fees pursuant to section 425.16, subdivision (c). He argued that Nixon Peabody's anti-SLAPP motion was frivolous or solely intended to cause delay.

While that motion was pending, Nixon Peabody filed a notice of appeal of the trial court's order denying its anti-SLAPP motion.

On January 17, 2014, the trial court denied Tamman's motion for attorney fees, finding "that the special motion to strike was [not frivolously] brought or solely intended to cause unnecessary delay."

On September 30, 2014, this court affirmed the trial court's order denying Nixon Peabody's anti-SLAPP motion. (*Tamman v. Nixon Peabody LLP*, *supra*, B252332.) In the "disposition" portion of the opinion, we found that "Tamman [was] entitled to his costs on appeal." (*Id*. at p. 15.)

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

After remand, on May 13, 2015, Tamman filed a motion for attorney fees, pursuant to sections 425.16, subdivision (c), and 128.5, subdivision (a), against Nixon Peabody and its attorneys, Hill Farrer. Tamman sought to recover fees and costs for opposing the original anti-SLAPP motion as well as attorney fees and costs incurred in connection with responding to Nixon Peabody's appeal.

On June 11, 2015, the trial court granted Tamman's motion in part, finding that he was "entitled to his costs and attorney fees for the appeal, including this motion. [Tamman] is not entitled to his costs and fees on the underlying [matter] as it has been decided that the motion was not frivolous. [¶] There was no appeal as to that issue, therefore that cannot be included in the amount. [¶] [Tamman] to resubmit the amounts."

Tamman resubmitted his fee request, seeking an award of $36,155 against Nixon Peabody and Hill Farrer. Nixon Peabody and Hill Farrer objected to Tamman's resubmission, arguing, inter alia, that Nixon Peabody's appeal was not frivolous and that the trial court's June 11, 2015, order did not comply with the requirements of section 128.5, subdivision (c).

On August 13, 2015, the trial court awarded Tamman $26,320 in attorney fees. The minute order does not indicate whether the fees were awarded against Nixon Peabody and/or Hill Farrer.

This timely appeal ensued.

DISCUSSION

I. Standard of review

Section 425.16, subdivision (c), provides, in relevant part: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." "The 'reference to section 128.5 in section 425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.' [Citation.]" (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199.) In

other words, "[a]n award of sanctions under the anti-SLAPP statute has two elements. First, the trial court must make a finding the SLAPP motion was frivolous or brought solely to delay the proceedings. Second, the court must follow the procedural requirements for a sanction order set out in section 128.5 which requires, among other things, the order 'shall recite in detail the conduct or circumstances justifying the order.' Failure to satisfy both these elements renders the order invalid." (*Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 682, fn. omitted.)

"Attorney fees under section 128.5 may be assessed against a party, the party's attorney, or both. [Citation.] . . . We review the trial court's order for an abuse of discretion. [Citation.]" (*Moore v. Shaw*, *supra*, 116 Cal.App.4th at p. 199.)

II. The trial court erred

Here, the trial court's order must be reversed. First, the trial court did not make a finding of frivolousness and we do not think it could. "A determination of frivolousness requires a finding the anti-SLAPP 'motion [was] "totally and completely without merit" [citation], that is, "*any reasonable attorney would agree such motion is totally devoid of merit*." [Citation.]' [Citation.]" (*Moore v. Shaw*, *supra*, 116 Cal.App.4th at p. 199.) While Nixon Peabody did not prevail, its motion was not frivolous. It argued that Tamman's underlying "claims arose from protected activity because they were based [upon] its 'response' to the SEC investigation and subpoena." (*Tamman v. Nixon Peabody LLP*, *supra*, B252332, at p. 8.) In light of the courts' "'fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16,'" Nixon Peabody's argument was not completely devoid of merit. (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.)

Second, the trial court did not issue "'a written factual recital, with reasonable specificity, of the circumstances that led the trial court to find the conduct before it sanctionable.'" (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 555.) Tamman's argument notwithstanding, the reference in the trial court's minute order to our prior opinion is insufficient because we never found Nixon Peabody's anti-SLAPP motion or appeal frivolous.

In urging us to affirm, Tamman argues that the "law of the case" dictates that he is entitled to attorney fees. We disagree. While our opinion in the prior appeal highlights why we were affirming the trial court's order, nothing therein held that Nixon Peabody acted frivolously in pursuing the anti-SLAPP motion. Stated otherwise, even though we affirmed the trial court's order, it was not "necessary" for us to find the motion and/or the subsequent appeal frivolous. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491.)

Tamman further argues that under section 425.16, subdivision (c), appellate challenges are also subject to an award of attorney fees and costs, which are determined by the trial court after the appeal is resolved. While true, Tamman is only entitled to recoup his attorney fees if there has been a finding of frivolousness. (See, e.g., *L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Assn. of Los Angeles* (2015) 239 Cal.App.4th 918, 933.) No such finding was made here, either by the trial court or by the Court of Appeal in the prior opinion.

It follows that we deny Tamman's request for an award of sanctions for having to oppose this appeal.

DISPOSITION

The order awarding attorney fees to Tamman is reversed. Nixon Peabody and Hill Farrer are entitled to costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT